## MALAYSIAN REPORTS

# ATTORNEY GENERAL & ORS. v. ARTHUR LEE MENG KUANG

[S.C. (Mohamed Azmi, Syed Agil Barakbah & Wan Hamzah S.C.JJ.) April 2, 3, 4, 28 & 29, 1986]

[Kuala Lumpur – Supreme Court Civil Application No. 7 of 1985]

*Practice and Procedure – Contempt of Court – Judicial decision – Criticism of – Need to protect dignity and integrity of superior courts – Balance between right of speech and expression and need to protect dignity and integrity of superior courts – R.H.C. 1980, O.52 r.2 – R.S.C. 1980, Rule 4.*

*Constitutional Law – Right of speech and expression – Protection of dignity and integrity of superior courts – Supreme Court – Criticism – Court of Judicature Act 1964, s. 13 – Federal Constitution arts. 10 & 126.*

*Legal Profession – Advocate and solicitor charged with contempt of court – Principles applied by court.*

In this case the application was for an order that the respondent be committed to prison for contempt of court. The respondent had acted for the plaintiffs in an application for declaratory orders and other reliefs against certain defendants. The application had been allowed in the High Court but on appeal the appeal was allowed ([1986] 2 M.L.J. 193). The respondent subsequently wrote letters to three Supreme Court Judges involved in the appeal and to the solicitiors of the appellants in the appeal. The letters were highly derisive of the Supreme Court. The respondent not only criticised the judgment of the Supreme Court but alleged that the decision of the Court was unjust and biased.

**Held:** (1) in this country the need to protect the dignity and integrity of the Supreme Court and the High Court is recognised by Article 126 of the Federal Constitution and also by section 13 of the Courts of Judicature Act, 1964. A proper balance must therefore be struck between the right of speech and expression as provided for in Article 10 of the Federal Constitution and the need to protect the dignity and integrity of the superior Courts in the interest of maintaining public confidence in the Judiciary;

(2) whether a criticism of a judgment is within the limits of reasonable courtesy and good faith must depend on the facts of each particular case. In determining the limit of reasonable courtesy the court should not however lose sight of local conditions;

(3) the issue to be determined in this case is not whether criticisms of the court's judgment are well-founded but it is whether having regard to all the circumstances of the case the criticisms levelled by the respondent at the Supreme Court are within the limits of reasonable courtesy and good faith;

(4) in this case on the evidence, the respondent has gone outside the two limits. The blatant accusations and insinuations made by the respondent are clearly intended to bring the court into disrepute and as such constitute the offence of scandalising the court. On the facts also the respondent was not within the limit of good faith, as here the personal interest of the respondent is overwhelming.

**Semble:** The Supreme Court was given birth only on January 1, 1985, and its sensitivity need not be the same as courts of similar jurisdiction in England or other countries. Having regard to local conditions, criticisms which are considered as within the limit of reasonable courtesy elsewhere are not necessarily so here. For the present, except possibly – and we say this with great reservation – for the limited purpose of proving it in actual court proceedings, any allegation of injustice or bias however couched in respectful words and even if expressed in temperate language, cannot be tolerated particularly when such allegations are made for the purpose of influencing or exerting pressure upon the court in the exercise of its judicial functions.

*Cases referred to:*

(1) *Sher Singh* v. *R.P Kapur* A.I.R. 1968 Punj. 217, 223.
(2) *McLeod* v. *St. Aubyn* [1899] A.C. 549, 561.
(3) *Reg.* v. *Gray* [1900] 2 Q.B. 36, 40.
(4) *Ambard* v. *Attorney General for Trinidad and Tobago* [1936] A.C. 322, 335.
(5) *Regina* v. *Commissioner of Police of the Metropolis, Ex parte Blackburn (No. 2)* [1968] 2 Q.B. 150.
(6) *Public Prosecutor* v. *The Straits Times Press Ltd.* [1949] M.L.J. 81.
(7) *Public Prosecutor* v. *S.R.N Palaniappan & Ors.* [1949] M.L.J. 246.
(8) *In the Read and Huggonson* (1742) 2 Atk. 469; 26 E.R. 683.

SUPREME COURT.

*T. Selventhiranathan* (Senior Federal Counsel) for the 1st applicant.

*G. Sri Ram* for the 2nd, 3rd & 4th applicants.

*Humphrey Ball* (*Yap Siong Cheng* with him) for the respondent.

*Cur. Adv. Vult.*

**Mohamed Azmi S.C.J.** (delivering the Judgment of the Court): This is an application under Order 52 Rules of the High Court 1980 read with Rule 4 RSC 1980, for an order that Mr. Arthur Lee Meng Kuang (hereinafter referred to as "the advocate") be committed to prison for contempt of court. After the advocate's motion to set aside the leave to commence the present proceeding was dismissed on March 20, 1986 (see SCCA No. 5 of 1986) we allowed the Attorney-General's application to be added as an applicant.

The undisputed facts of this case show that the second, third and fourth applicants (hereinafter referred to as "the appellants") were defendants in Originating Summons No. 182 of 1983 filed by Thai Sang and Leong Kum Weng in the High Court at Johor Bahru. As purchasers of a particular portion of Merlin Towers in Johor Bahru, Lai and

Leong (to be referred as "the respondents") prayed for declaratory orders and other reliefs against the appellants. The summons was heard by Abdul Razak J. who allowed the respondent's prayers on February 25, 1984. The appellants appealed against the decision, and on March 11, 1985 the appeal was heard together with another related appeal by the Supreme Court comprising Abdul Hamid C.J. (Malaya), Wan Suleiman and Seah S.C.JJ. (FCCA No. 79 of 1984). Written judgment was delivered on May 18, 1985 whereby the appeal was unanimously allowed (see [1985] 2 M.L.J. 380). The advocate (Mr. Arthur Lee) represented the respondents at the hearing in the High Court and also during the appeal, and needless to say, he was extremely unhappy and disappointed with the outcome. In the past, the advocate could advise his clients to appeal to the Judicial Committee of the Privy Council against a decision of the Federal Court. But, as a result of amendments by Act A566 and Act A600 to the Federal Constitution and to the Courts of Judicature Act 1964, right of appeal to the Privy Council has ceased to exist with effect from January 1, 1985, and by the same amendments, the former Federal Court is replaced by the present Supreme Court which becomes a final court of appeal. Apparently, it is because of the inability of the advocate to accept the present legal position of no further appeal or review from the decision of the Supreme Court that he embarked on the extraordinary mission of writing various letters to the court and to the solicitors of the appellants and copied to others, criticising the court's judgment in allowing the appeal. The object of the exercise is unmistakably to persuade and influence the panel that allowed the appeal to review the case by reversing its own decision delivered on May 18, 1985. Four of these letters are the subject matter of the present contempt proceedings, *viz*. one addressed to the three appellate judges; one to M/s Sri Ram, Zulkifly and Kumar, solicitors of the appellants, and two letters addressed personally to Mr. Sri Ram and Mr. S. Balarajah. According to paragraph 4 of the statutory statement filed pursuant to Order 52 Rule 2(2) RHC the grounds on which committal is sought, is the conduct of the advocate in writing one or more of the four letters. By paragraph 5 of the supporting affidavit dated June 14, 1985, Mr. C. Vijayakumar affirmed that "the remarks contained in these letters whether taken individually or in a combination of two or more, as a whole, are highly derisive of this honourable court and therefore in the circumstances constitute a serious contempt."

At the close of case for the Attorney-General and the appellants, we have overruled Mr. Humfrey Ball's submission of no case to answer. On the material before us and on consideration of the submissions made by counsel, there is no dispute that the four letters referred to in the appellants' statement are written and sent by the advocate to the three Supreme Court Judges involved in the appeal and to the solicitors of the appellants. We have read the letters and we find at least two of them are as a whole highly derisive of the Supreme Court which reversed the judgment of Abdul Razak J. They are firstly, the long letter dated May 26, 1985 addressed to the three appellate judges and copied to counsel for the appellants, and secondly, the letter dated May 28, 1985 addressed to Mr. Sri Ram and Mr. S. Balarajah and copied to the three appellate judges, the Lord President, Abdul Razak J. and President of the Bar Council. We need only consider the long letter of May 26. Throughout this long letter the advocate has not only criticised the judgment of the Supreme Court, but has gone further by alleging that the decision of the Court is unjust and biased. Implicit in the letter is a threat that unless the panel agrees to review its decision by restoring Abdul Razak J.'s order, there is no justice in the court. In our view, on the facts and the law as presented by Mr. T. Selventhiranathan on behalf of the Attorney-General and by Mr. Sri Ram for the appellants. a *prima facie* case has been established for the advocate to answer the charge. We find the advocate has gone beyond fair criticism and fair comment on the judgment of the court. The judgment of the panel is a final judgment, and as an officer of the court the advocate is obliged to accept the final outcome of the litigation however unpleasant it might be to his clients. The respondents as unsuccessful party have no more right of appeal under the law, and in harassing the panel to reverse its own judgment due to alleged mishandling of the case, the advocate is in our opinion interfering in the course of justice and such conduct is punishable as contempt. Apart from the conduct to impair the administration of justice by writing directly to members of the panel, and by meeting and soliciting support from judges of the Supreme Court in the absence of solicitors for the appellants, the long letter of May 26 also contains allegations which scandalise the court. Other than being unjust, the court is also accused of having:-

(i) employed a complete non-sequitur to arrive at its decision and that the decision of the High Court is reversed without reason;

(ii) exercised its discretion in favour of the appellants without any evidence on the issue of delay by the respondent in bringing the action;

(iii) arrived at its decision without cogent rationalisation; and

(iv) accepted each and every argument put forward by counsel for the appellants without relating fully to the facts of the case, and without giving due consideration to the submission of the advocate.

In his evidence on oath the advocate denies that allegation (iv) above imputes bias on the part of the court. The advocate also contends that on May 24, 1985 after reading the reply from the Honourable the Lord President, he was prepared to accept His Lordship's explanation that the appeal could not be reopened. But after being requested by the Honourable the Chief Justice to send in a fuller case, he changed his mind and on the same day prepared and submitted his full case to the judges. He also explained that he had two choices – first, to file an application in the Supreme Court for review following normal procedure, and secondly, to urge the panel to review its decision voluntarily before the order of the court is perfected and extracted. He decided to adopt the second course of action and therefore did not invite the appellants' solicitors to be present during his meetings with the Lord President, the Chief Justice and other judges on May 24. He took 5 days to consider his stand. He maintained that none of the letters contains any harsh or insulting remarks, and that the purpose of writing the impugned long letter was to protect the good name of the Supreme Court. The four letters were not made public but were restricted to members of the Judiciary and the Bar.

Although in *Sher Singh* v. *R.P. Kapur*[1] contempt of court has been described as "a mysterious and indefinable offence", it may be classified under several heads. Apart from contempt *ex facie* of the court and contempt on cases pending in the courts, there is a third head of contempt of court by the publication of scandalous matter of the court itself. Although in *McLeod* v. *St. Aubyn*[2] in delivering the judgment of the court, Lord Morris observed that in England, "Committals for contempt of Court by scandalising the Court itself have become obsolete," the observation was disapproved the following year in *Reg.* v. *Gray*[3] where Lord Russell said:

> "Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke L.C. characterised as 'scandalising a Court or a judge." [*In re Read and Huggonson* ((1742) 2 Atk. 469)]."

Be that as it may, Lord Morris's ruling that in other countries "the enforcement in proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court" is cited with approval in *Ambard* v. *Attorney General for Trinidad and Tobago.*[4] In this country, the need to protect the dignity and integrity of the Supreme Court and the High Court is recognised by Article 126 of the Federal Constitution and also by section 13 of the Courts of Judicature Act 1964. A proper balance must therefore be struck between the right of speech and expression as provided for in Article 10 of the Federal Constitution and the need to protect the dignity and integrity of the Superior Courts in the interest of maintaining public confidence in the Judiciary. On criticism of the court's judgment, we find the law has been well stated by Salmon L.J. in *Regina* v. *Commissioner of Police of the Metropolis, Ex parte Blackburn (No. 2)*[5] where at page 155G he said:

> "It follows that no criticism of a judgment, however vigorous, can amount to contempt of Court, providing it keeps within the limits of reasonable courtesy and good faith."

Whether a criticism is within the limits of reasonable courtesy and good faith must in our view, depend on the facts of each particular case. In determining the limit of reasonable courtesy the court should not however lose sight of local conditions, a proposition laid down in *Public Prosecutor* v. *The Straits Times Press Ltd.*[6] and *Public Prosecutor* v. *S.R.N. Palaniappan & Ors.*[7] where Spenser Wilkinson J. hesitated, quite correctly, to follow too closely the decisions of English Courts on the subject of contempt without first considering whether the relevant conditions in England and this country are similar. It is also necessary to bear in mind the following passage which appears at page 30 of *Borrie and Lowe's* Law of Contempt, 2nd Edition:-

> "There are however, limits to judicial tolerance and though judicial sensitivity will vary with the judge, time and place, it is always wise to heed any warnings from the bench. The courts seem most sensitive to accusations of bias. As Philip

J. said in the Australian case, *Reece* v. *McKenna, Ex parte Reece* ([1953] Q.S.R. 258, 264), "to impute injustice to a justice is to insult him in respect of the very title he wears; ..."

Having regard to the principles which we have cited, the issue to be determined here is not whether the criticisms of the court's judgment are well founded, but it is whether having regard to all the circumstances of the case, the criticisms levelled by the advocate at the Supreme Court are within the limits of reasonable courtesy and good faith. Reading the impugned long letter of May 26 as a whole, and having regard to the entire evidence and submissions of counsel, we find the advocate has gone outside the two limits. Throughout the letter, the advocate accuses the Supreme Court of injustice. He also insinuates bias against the court in allowing the appeal, when he alleges that the court only gave consideration to the submission made by counsel for the appellants but not that of the respondents. Such blatant accusations and insinuation are clearly intended to bring the court into disrepute, and as such constitute the offence of scandalising a court as laid down by Lord Hardwicke in the case of *In re Read and Huggonson*[8]. The Supreme Court was given birth only on January 1, 1985, and its sensitivity need not be the same as courts of similar jurisdiction in England or other countries. Having regard to local conditions, criticisms which are considered as within the limit of reasonable courtesy elsewhere, are not necessarily so here. For the present, except possibly – and we say this with great reservation – for the limited purpose of proving it in actual court proceedings, any allegation of injustice or bias however couched in respectful words and even if expressed in temperate language, cannot be tolerated particularly when such allegation is made for the purpose of influencing or exerting pressure upon the court in the exercise of its judicial functions.

The advocate is also not within the limit of good faith. The absence of good faith is established from the following facts. First, the vital distinction between *Ex parte Blackburn (ante)* and the present case, is that the writer of the article in the *Punch* magazine had only public interest in the matter. Whereas here the advocate's personal interest is overwhelming in that the avowed purpose of the whole criticism is to influence the court to reverse its decision in favour of the respondents who are his clients. The object is therefore to exert influence upon the court in the exercise of its judicial function. Secondly, there is lack of good faith when the advocate failed to disclose in any of his letters or to any of the judges with whom he had audience, of the fact that his family company – Arthur Lee Sendirian Berhad, are purchasers of 2½ lots of space in the building which formed the subject matter of the litigation. There is clearly a conflict of interest when the advocate appeared as counsel for the respondents both in the High Court and in the appeal. Rule 3(b) (ii) of the Legal Profession (Practice And Etiquette) Rules 1978 provides that an advocate and solicitor should not accept a brief where there is some personal relationship between him and a party or a witness in the proceedings. Nor is he allowed to accept a brief by Rule 5(a), if such accepance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice. As a result of his failure to observe these Rules, there is every likelihood that the advocate has allowed his duty towards the court to become subordinate to that owed to his clients with whom he has a common interest in the subject matter of the litigation. We therefore, decline to accept the advocate's contention that he made the criticism in good faith purportedly for the benefit of this court. In our view, it is done more likely in the interest of his family company which would definitely stand to gain by getting the decision of the court reviewed and reversed. Thirdly, the advocate admits under cross-examination by Mr. T. Selventhiranathan appearing for the Attorney-General, that his conduct in approaching the Lord President in the absence of counsel for the other side is improper, and in our view such surreptitious conduct clearly shows absence of good faith. His explanation that he would get speedier redress by taking the course that he did, before the court order is extracted, cannot possibly be true because if the said order is unconstitutional as alleged, then the decision of the court would be null and void *ab initio*, and it would make no difference whether the order is perfected or otherwise for the purpose of taking the matter to open Court. In our view, the advocate was not acting in good faith when he elected in the first instance not to apply in open court for the possibility of a review, but instead try to garner support from judges of the Supreme Court and others by soliciting them in a clandestine manner. Finally, the advocate was not acting in good faith in sending the contumelious long letter since he had earlier in the day accepted the Lord President's written explanation that the appeal could not be reopened. In evidence, he testified that he typed the said letter in an office in Kuala Lumpur after he had an audience with the Lord President on May 24, 1985 and delivered it to the Judges on the same day. He

said he changed his mind in accepting the Lord President's explanation because of his meeting on the same day with the Chief Justice whom he alleged had requested him to put in a fuller case. We cannot accept the testimony that the impugned letter was sent at the behest of the Chief Justice for the simple reason that that letter is dated May 26, whereas the letter allegedly written in response to the Chief Justice's request was typed and delivered on May 24.

In the circumstances of this case we are satisfied beyond reasonable doubt that the advocate is guilty of contempt of court.

In assessing sentence, we agree that custodial sentence is not necessary in this particular case. On the other hand, we take into account the attitude of the advocate during the whole proceedings. As an officer of the court, he has not disclosed any sign of regret or remorse for what he has done and the damage he has inflicted on the dignity and integrity of the court. Although the application by the Attorney-General and the appellants is for an order of committal, having regard to all the factors and circumstances of this case, we impose a fine of $5,000.00 in default three months' imprisonment which in our view is fair and adequate. In imposing the sentence we also take into consideration that the commission of the offence is the first in point of time against the Supreme Court, and the publication of the contumelious letters is limited to the Judicial fraternity. We wished that the advocate had tendered his apology before the hearing of this application and that he would plead for leniency after he is found guilty, to enable us to consider them as additional mitigating factors.

We also order that the advocate should pay the costs of this application both to the Attorney-General and the appellants.

*Order accordingly.*

Solicitors: *Sri Ram, Zulkifly & Kumar; Arthur Lee & Co.*

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## NOVOTEL SOCIETE D' INVESTISSEMENTS ET D' EXPLOITATION HOTELIERS & ANOR. v. PERNAS HOTEL CHAIN (SELANGOR) BHD.

**[S.C. (Salleh Abas L.P., Wan Suleiman & Mohamed Azmi S.C.JJ.) January 6 & May 7, 1986]**

**[Kuala Lumpur – Supreme Court Civil Appeal No. 82 of 1985]**

*Contract – Management fees – Claim for – Importance of pleading – Interest – Discretion of court – Civil Law Act, 1956, s.11.*

*Practice and Procedure – Pleading – Importance of – Interest – Discretion of court – Civil Law Act, 1956, s.11.*

*Practice and Procedure – Interest awarded by lower court – Interference by appellate court – Exercise of discretion – R.H.C. 1980, O.42 r. 12.*

In this case the respondents, the owners of the former Jayapuri Hotel at Petaling Jaya, had appointed the appellants as their agent to carry out and execute all services or acts required in relation to the mangement of the hotel. The management agreement was subject to approval by the Malaysian Government. In the event the Government amended the incentive fee payable and this was treated as a refusal. The agreement therefore never came into effect and the claim of the appellants was for outstanding management fees payable for the interim period prior to the date of the Government's conditional approval. In their statement of claim the appellants claimed the sum of $300,000 and interest at the rate of 8% per annum on the decretal sum from the date of demand that is March 23, 1982 till the date of realisation. The appellants applied for summary judgment and the Senior Assistant Registrar allowed the application. On appeal the learned Judge found no arguable case on the issue of liability but he ordered that the issue on quantum of management fees be tried before the Senior Assistant Registrar. The Senior Assistant Registrar assessed the management fees payable at $495,193.85 cts. on the basis of the interim period of 6 months on 22 days but judgment was entered only in the sum of $300,000. The respondents appealed contending that the length of the interim period should only be 4 months and not 6 months and 22 days as found by the Senior Assistant Registrar. The appellants also cross-appealed. The following issues were raised before the learned Judge in the appeal:

(i) Whether the Senior Assistant Registrar was correct in concluding that the interim period was 6 months and 22 days pursuant to Article 6(1) (a) of the management agreement.

(ii) Whether the Senior Assistant Registrar was correct in fixing the rate of incentive fee at 9% instead of 12% of the gross operating profit pursuant to Article 6(1) (b) of the said agreement.

(iii) Whether the rate of 8% interest on the judgment sum should run from the date of demand (March 23, 1982) as prayed and allowed by the Senior Assistant Registrar's first order dated January 12, 1984.

The learned Judge allowed the respondents' appeal on